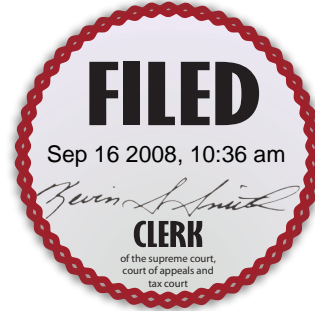


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JEFFREY SCHLESINGER
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY GIDDEON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0712-CR-613

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0706-FD-44

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Anthony D. Giddeon appeals his conviction, after a jury trial, of residential entry¹ and domestic battery,² class D felonies.

We affirm.

ISSUES

1. Whether the trial court erred when it admitted evidence of Giddeon's prior violent acts against Newman.
2. Whether statements made by the prosecutor during closing arguments constituted fundamental error.
3. Whether the trial properly weighed the aggravating and mitigating circumstances when it imposed Giddeon's sentence.

FACTS

In 2002, during their freshman year of high school, Giddeon and Charia Newman became involved in a relationship. On March 21, 2004, Newman gave birth to their son. Throughout their relationship, she lived with her mother in an apartment building located at 3820 Carey Street in East Chicago, Indiana. She and her mother lived in the upstairs apartment and Newman's uncle, Frank Smith, lived in the apartment below.

At some point during their relationship, Giddeon became possessive and violent towards Newman. She was not allowed to speak to other males and if she did, Giddeon verbally and physically abused her. If she did not answer the telephone fast enough or if she was not at home at a certain time, he would "beat" her. (Tr. 94). Throughout the five-year relationship, he physically abused Newman more times than she can recall.

¹ Ind. Code § 35-43-2-1.5.

² I.C. § 35-42-2-1.3.

After he abused her, he would apologize and buy her gifts. Despite the abuse, she stayed in the relationship with Gideon so they would be a family for their son.

On an unspecified date between the birth of her son and March 26, 2006, Smith heard a commotion in Newman's apartment. He heard "hollering" and "rumbling" and observed water leaking from Newman's bathroom into his living room. (Tr. 219). He ran upstairs to Newman's apartment to investigate. Newman's mother was at work; Newman, Gideon, and their son were the only people in the apartment. While holding her head and crying, Newman told Smith that Gideon "slammed her head on the face bowl." (Tr. 219). Smith asked Gideon to leave, but he refused. Smith went downstairs and told his wife to call his son, a police officer for the East Chicago Police Department, who would make him leave. Smith then went back upstairs to ask Gideon to leave again; however, Gideon had already left. Newman continued in the relationship for the sake of her son.

On March 27, 2006, Newman was at her apartment fixing her friend's hair when Gideon came by. Gideon told Newman that he did not like her friend and that her friend had to leave. He argued with Newman, struck her, and her friend called the police. The police arrived and ordered Gideon to leave the apartment and not come back. He left as ordered; but, he returned in less than ten minutes after the police left. He kicked down Newman's door and entered her apartment. Once inside, he argued with Newman, struck her in the face, and pulled the telephone cord out of the wall. Someone heard the commotion and called the police again. When the police arrived, they observed that the door had been kicked in, Newman was crying, and her face was swollen. Gideon was

arrested for domestic battery. Later, Newman had the charges dismissed because she “thought things w[ere] going to get better” between them. (Tr. 102).

Sometime in April of 2007, Newman decided to end her relationship with Gideon because she heard that he had fathered a child with another woman. The abusive nature of their relationship was also a factor in her decision.

On May 5, 2007, Newman stopped at a gas station while on her way to a birthday party with some friends. While she was at the gas station, Gideon approached her. He demanded that she get out of the car and told her that she was not allowed to go to the party with her friends. She refused his demand and an argument ensued. Before departing, Gideon told Newman that “there would be consequences” for her noncompliance. (Tr. 107). She attended the party and did not see Gideon again until the night of May 30, 2007.

On May 30th, Newman and her son arrived at her apartment around 10:00 p.m. She unlocked the door and entered her darkened apartment. After entering the apartment and turning on the light, her son said, “There goes Tony.” (Tr. 117).³ Newman noticed Gideon standing in the living room, waiting in the dark. She had no idea how he gained entry to her apartment without her consent. He began arguing with her, asking her where she had been all day. He then struck her on the face and legs with his fist. At some point, he turned his back and she grabbed her son and ran downstairs to her car. Gideon chased her, but could not catch her because he wore his pants low, “hanging off of him”,

³ Gideon and Newman’s son refers to his father as Tony.

and they started to fall off during the chase. (Tr. 124). She drove directly to a police station and filed a report about the incident.

On June 2, 2007, the State charged Gideon with residential entry as a class D felony. Apparently, Gideon could not make bond and filed a demand for a speedy trial on September 6, 2007. On September 21, 2007, the State filed notice of its intent to use evidence of prior acts of violence against Newman to establish motive, intent, preparation, plan, knowledge, and absence of mistake or accident. On October 4, 2007, the State filed an amended information and added the count of domestic battery, as a class D felony. On October 18, 2007, the State renewed its notice of its intent to use evidence of prior acts of violence against Newman to establish motive, intent, preparation, plan, knowledge, and absence of mistake or accident.

Prior to trial, Gideon filed a Motion in Limine to bar the State from introducing evidence of prior acts of violence against Newman. After the trial court conducted a hearing, it denied Gideon's motion and ruled that such evidence could be admitted for the limited purposes of establishing motive, intent, preparation, plan, knowledge, or absence of mistake or accident.

On October 22, 2007, a jury trial commenced. During the trial, the jury heard testimony of the foregoing from Newman, Smith, and Officers Rias, London, and Santos. Gideon made no objections during the State's closing argument. The jury found Gideon guilty of residential entry, as a class D felony, and domestic battery, as a class D felony.

On November 28, 2007, the trial court sentenced Giddeon to consecutive sentences of two-and-a-half years on each count for a total of five years.

DECISION

1. Admission of Evidence

Giddeon argues that the trial court abused its discretion by admitting evidence of prior acts of violence against Newman. We disagree.

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor.

Williams v. State, 782 N.E.2d 1039, 1040 (Ind. Ct. App. 2003) (quotations and citations omitted).

Pursuant to Indiana Rule of Evidence 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Ind. Evidence Rule 404(b). The rule is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past conduct or behavior.

Greenboam v. State, 766 N.E.2d 1247, 1252 (Ind. Ct. App. 2002) (citing *Hicks v. State*, 690 N.E.2d 215, 218 (Ind. 1997)).

In determining whether to admit evidence under Indiana Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Greenboam*, 766 N.E.2d at 1252. Under Indiana Evidence Rule 403, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice; confusion of the issues; misleading the jury; undue delay; or needless presentation of cumulative evidence; the evidence may be excluded.

The jury heard testimony from Newman and Smith that described several of Gideon's prior acts of violence against Newman. She testified that during their five-year relationship, Gideon would not allow her to speak to other males and that, if she did, he would "beat" her. (Tr. 96). She testified that Gideon abused her more times than she can recall. She testified specifically about the events that took place on March 7, 2006 – the date he kicked in her door, pulled her telephone line out of the wall, and struck her in the face. Smith testified that on one occasion, he went upstairs to Newman's apartment in response to "rumbling" and "hollering," followed by a water leak from her apartment. (Tr. 219). Smith observed Newman holding her head and crying, and she said that Gideon had just "slammed her head on the face bowl." (Tr. 219).

The evidence of Giddeon's prior acts of violence was not used for the purpose of proving his propensity to commit the charged offenses herein; rather, the evidence was used as proof of the hostility that existed between the parties. Where the relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admitted for a limited purpose. *Iqbal v. State*, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004) (citing *Hicks*, 690 N.E.2d at 222). During a pretrial conference, the trial court ruled that the State was allowed to use evidence of Giddeon's prior acts of violence against Newman for the limited purpose of establishing a motive under Rule 404(b). Accordingly, during the trial, the State presented evidence of Giddeon's prior acts of violence for that limited purpose.

Giddeon further argues that the probative value of Smith's testimony was lowered and inadmissible due to the lapse of time between the prior act of violence and the instant charged offense.⁴ As a result, he argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Indiana Evidence Rule 403.

With regard to motive, evidence of a prior extrinsic act that is too remote in time to the events at issue may be rendered inadmissible when balanced between its probative value and the risk of unfair prejudice. *Kien v. State*, 866 N.E.2d 377, 383 (Ind. Ct. App. 2007). The probative value of the evidence of prior violent acts may be diminished if there is a long lapse of time between it and the current offense. *Bryant v. State*, 802 N.E.2d 486, 497 (Ind. Ct. App. 2004). Evidence of a prior assault that took place more

⁴ The State did not provide a specific date for when the prior act of violence described in Smith's testimony occurred; however, the State assured the trial court that the prior incident had occurred "within the last three years." (Tr. 217).

than three years before the charged offense may be of relatively low probative value. *Id.* (citing *Spencer v. State*, 703 N.E.2d 1053, 1056 (Ind. 1999)).

Although a lapse in time of a prior act of violence may diminish its probative value, its admissibility does not necessarily indicate an abuse of discretion. *See Crain v. State*, 736 N.E.2d 1223 (Ind. 2000) (no abuse of discretion where trial court admitted evidence of two of defendant's prior acts of violence against the instant victim, occurring three and six years prior to the current crime). In general, the trial court has wide latitude in weighing the probative value of the evidence against the possible prejudicial effect of its admission. *Brown v. State*, 747 N.E.2d 66, 68 (Ind. Ct. App. 2001). The appellate court reviews the trial court's balancing decision under Indiana Evidence Rule 403 for an abuse of discretion. *Id.*

Smith testified that he heard an altercation between Giddeon and Newman, and witnessed her holding her face and crying. Smith further testified that Newman said that Giddeon had just "slammed her head into the face bowl." (Tr. 219). This incident took place less than three years before the charged offenses Giddeon was presently facing. Thus, Smith's testimony was highly probative of motive and illuminated the hostility that permeated Giddeon and Newman's relationship.

We conclude that the trial court's decision to admit evidence of Giddeon's prior acts of violence against Newman did not constitute an abuse of discretion.

2. Prosecutorial Misconduct

Next, Gideon asserts that the prosecutor committed fundamental error by making statements not supported by the evidence during her closing argument. Again, we disagree.

In reviewing a claim of prosecutorial misconduct, a court determines: (1) whether the prosecutor engaged in misconduct and, if so, (2) whether the misconduct had a probable persuasive effect on the jury. *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004). A party's failure to present a contemporaneous objection challenging the prosecutorial misconduct constitutes waiver and precludes appellate review of the claim. *Gregory v. State*, 885 N.E.2d 697, 706 (Ind. Ct. App. 2008) (citing *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002)). However, such waiver may be avoided if the alleged misconduct amounts to fundamental error. *Gregory*, 885 N.E.2d at 706. The fundamental error exception to the waiver rule is extremely narrow. *Cooper v. State* 854 N.E.2d 831, 835 (Ind. 2006). To prevail on such a claim, the defendant must establish not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. *Gregory*, 885 N.E.2d at 706. For a claim of prosecutorial misconduct to rise to the level of fundamental error, the defendant must demonstrate that the misconduct made a fair trial impossible or constituted a clear blatant violation of basic and elementary principles of due process and presents an undeniable and substantial potential for harm. *Id.*

Without any objections by Gideon, the State made the following comments during its closing argument:

When I came into my office on Monday, beginning of this week, [sic] I was walking down the hallway and I passed a bulletin board and I noticed this

flyer on the bulletin board, and it says something about a candlelight vigilance, [sic] and I believe it was last Friday somewhere over in Gary. But the thing that caught my attention that [sic] it was a candlelight vigilance [sic] for domestic violence victims. At that point I realized, wow, this is October. This is Domestic Violence Awareness month.

I believe in defense counsel's opening statement he said something to the effect that the State was trying to lay out the entire relationship between the defendant and the victim, Charia Newman. Ladies and gentleman I submit to you that if the state were to attempt to lay out each and every incident where our victim, Charia Newman, had been subjected to domestic violence by this defendant, Anthony Giddeon, we would be here probably weeks If the State were to simply show this May 30 incident on its own, you wouldn't really understand it. But when you look at it in the context of that relationship, all of a sudden you can put the two together and you understand what happened.

And let's talk about what we all know from our day-to-day experiences about domestic violence. Domestic violence is something that goes in a cycle. We talk about I [sic] think there are basically three different phases that you talk about in domestic violence situations. The first phase would actually be what's considered the tension phase. The next phase is usually the battery itself. And then the third phase is what's referred to as the honeymoon stage.

Most times in this courtroom, the voices of our victims come from the grave. Charia's didn't [A]s I prepared for this case, I even remember coming across something, a program called Remember My Name. It's for victims of domestic violence who had been killed. I'm asking you remember Charia Newman's name today. Don't let Charia Newman have to die for someone to remember her name.

Although some of the State's closing arguments may have been improper, they do not fall into the narrow exception of fundamental error. In final arguments, a prosecutor can "state and discuss the evidence and reasonable inferences that can be derived therefrom so long as there is no implication of personal knowledge that is independent of the evidence." *Gregory*, 885 N.E.2d at 708 (citing *Hobson v. State*, 675 N.E.2d 1090,

1096 (Ind. 1996)). Furthermore, statements of opinion are not prohibited. *Id.* (citing *Hughes v. State*, 508 N.E.2d 1289, 1303 (Ind. Ct. App. 1987)).

First, Gideon argues that the admission of the prosecutor's statements in reference to an unrelated candlelight vigil for victims of domestic violence and her reference to October as Domestic Violence Month amounts to fundamental error. These statements may have been improper because they were not based upon evidence presented in the record. *Lambert v. State*, 743 N.E.2d 719, 734 (Ind. 2001). However, the aforementioned statements did not present undeniable substantial potential harm to Gideon. *Gregory*, 885 N.E.2d at 706. The fact that October is Domestic Violence Month or that candlelight vigils are held for victims of domestic violence could be considered matters of common knowledge. As a result, we find that the prosecutor's comments were not likely to have a persuasive effect on the jury or to have risen to the level of fundamental error, eliminating the possibility of a fair trial.

Second, Gideon argues that the prosecutor's statement, "If the state were to attempt to lay out each and every incident where our victim, Charia Newman, had been subjected to domestic violence by this defendant, Anthony Gideon, we would be here probably weeks," was not based on facts admitted in evidence. (Tr. 338). To the contrary, the prosecutor's statement was based on Newman's testimony that throughout their five-year relationship, Gideon abused her so many times that she lost count, and that fights occurred "all the time" between them. (Tr. 93). Further, the prosecutor's comments were nothing more than her opinion in describing the tumultuous relationship that existed between Gideon and Newman.

Finally, Giddeon argues that the prosecutor pleaded with the jury to convict Giddeon based on factors other than the evidence in the case. During closing argument, the prosecutor asked that the jurors draw on their life experiences to realize that domestic violence is cyclical. She also told the jurors that they should look at Newman and Giddeon's relationship in context and not let Newman be killed before recognizing the problem. We conclude that the prosecutor's plea to the jury was based on some fact found in the evidence; however, her comments amounted to nothing more than a characterization that domestic violence is a vicious cycle that can be disastrous if not addressed. Therefore, no fundamental error was committed.

3. Mitigating Circumstances

Giddeon contends that the trial court abused its discretion by failing to properly weigh the mitigating and aggravating factors at sentencing.

Indiana's amended sentencing scheme, which changed the sentencing guidelines to advisory, as opposed to presumptive sentences, was enacted on April 25, 2005.⁵ It thus applies to Giddeon, whose crimes were committed on May 30, 2007. *Anglemyer v. State*, 868 N.E.2d 482, 491-92. As such, we review Giddeon's sentence under the advisory sentencing scheme in place when he committed his crimes. *Id.*

Under Indiana's new advisory sentencing scheme, the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence within the statutory range; therefore, a trial court can not now be said to have abused its discretion in failing to properly weigh such factors. *Id.* at 491. Accordingly,

⁵ I.C. § 35-38-1-7.1(d); I.C. § 35-50-2-1.3.

Giddeon's argument that the trial court abused its discretion by failing to properly weigh the mitigating and aggravating factors at sentencing properly is not reviewable on appeal.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.